No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE AMICI CURIAE[1]

Amici are professors of law who focus on the fields of administrative law and government regulation. They have extensively studied and written on administrative law doctrines of judicial review, including *Auer* deference. They have a strong interest in how the Court's decision in this case will affect administrative law.

Amici include:[2]

Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law

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[1] All parties have filed blanket consents to the filing of briefs *amicus curiae*. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Amici join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

Kevin M. Stack, Lee S. & Charles A. Speir Professor of Law, Vanderbilt Law School

Adrian Vermeule, Ralph S. Tyler Professor of Constitutional Law, Harvard Law School.

SUMMARY OF THE ARGUMENT

The presumption that reviewing courts should defer to agency interpretations of their own regulations, as set forth in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), is sound and should be maintained. As this Court has recognized for more than a century, see *United States v. Eaton*, 169 U.S. 331, 343 (1898), deference to an administrative agency's interpretation of ambiguities in the regulations it implements is amply justified on pragmatic grounds and as a matter of principle. Agencies possess technical and policy expertise that reviewing courts generally lack. They are therefore in a far better position to discern which interpretation of an ambiguous regulation will best advance the policy objectives the agency is charged with achieving in a variety of complex regulatory and factual contexts. At the same time, deference promotes democratic accountability by ensuring that these discretionary and inevitably policy-inflected judgments are made by an elected Executive that can be held responsible for its judgments and actions, rather than by unelected judges.

The objections to *Auer* deference advanced by Petitioner and his supporting amici lack merit, and do not come close to providing a justification for overruling *Auer* and abandoning the longstanding and sensible approach to judicial review that *Auer* reflects.

Auer deference is hardly an abdication of the judicial role. Reviewing courts decide whether an agency regulation at issue is ambiguous; whether the agency's interpretation is within the scope of interpretive choices that ambiguity affords; whether the interpretation is arbitrary or unreasonable; whether there is reason to suspect that the agency's interpretation does not reflect its fair and considered judgment; whether the interpretation creates a risk of unfair surprise because it conflicts with a prior interpretation of the agency or appears to be nothing more than a convenient litigating position; whether the agency has explained its reasoning; and whether its reasoning is arbitrary and capricious. These limitations on agency discretion, which have emerged over time in light of experience as courts have considered agency interpretations of ambiguous regulations in a variety of contexts, respond effectively and proportionately to the concerns of *Auer*'s critics about an excessively deferential judicial role.

The principal consequentialist argument against *Auer* deference—that it creates incentives for agencies to promulgate broad and ambiguous regulations that afford agency decision-makers maximum flexibility to make basic policy choices while avoiding Administrative Procedure Act (APA) procedural requisites for rules with binding effect—likewise lacks any foundation. Whether or not such an incentive exists in theory, there is no evidence that it has an appreciable impact in the real world. Indeed, powerful forces push agencies in precisely the opposite direction. Clear and specific regulations respond to the expressed needs of regulated entities for guidance sufficient to allow them to order their affairs; they also enhance the effectiveness of agency regulatory enforcement. Clarity and

specificity also improve the prospects that regulations will be upheld when challenged as arbitrary and capricious under the APA. Moreover, promulgating detailed and precise regulations also reduces the discretion of future agency administrators, whose policies, views, and values may be quite different, to redirect agency policy in significant ways simply by exploiting ambiguities in existing regulations.

Most fundamentally, *Auer* deference is entirely consistent with the Constitution's separation of powers and with the APA. *Auer* effects no transfer of the judicial power to agencies and instead leaves courts ample room to police agency interpretations of regulations. The field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a balance of power among the branches of government. When an agency action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms apply in the same way as they usually do in the case of other administrative actions. The relevant separation-of-powers question for courts is whether the agency has acted within the scope of authority Congress has delegated to it, not whether it is combining lawmaking and law-interpreting functions—as such commingling of functions has been a common and uncontroversial feature of public administration for more than a century. Finally, against that backdrop, there is no reason to read Section 706 of the APA (which instructs courts reviewing agency action to decide "all relevant questions of law") as forbidding courts from affording agency interpretations of ambiguous regulations the deference they have historically afforded them. Its language does not require that reading; nor does its history show any intention to prevent such deference.

ARGUMENT

I. *Auer* is a Sound Administrative Law Doctrine.

A. *Auer* reflects the most sensible allocation of authority between agencies and courts both as a pragmatic matter and as a matter of principle.

Judicial deference to administrative agency interpretations of the regulations they administer did not start with *Auer*. It dates back at least to the nineteenth century. *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness."). And this Court's 1945 decision in *Seminole Rock* setting forth the principle that courts should defer to agency interpretations of ambiguous regulations was hardly the bolt from the blue (or idiosyncratic context-specific decision) that Petitioner and his supporting amici claim. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Instead, that decision built upon a substantial body of precedent.[3]

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[3] In *Seminole Rock*, the brief for the United States, written by Professor Henry Hart, invoked that body of precedent. See Brief for Petitioner, *Seminole Rock*, No. 914, at 20–21 (O.T. 1944) (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n.6 (1940); cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 325 (1933); *American Tel. and Tel. Co. v. United States*, 299 U.S. 232, 242 (1936); *Morgan Stanley & Co. v. SEC*, 126 F. 2d 325 (2d Cir. 1942)). The brief's list of precedent was not exhaustive. See, e.g., *Glen Alden Coal Co. v. NLRB*, 141 F.2d 47, 52 (3d

This doctrine of deference has deep historical roots for a reason: it strikes the most appropriate, and democratically legitimate, accommodation of the role of the Executive in administering the law and the role of the courts in ensuring that the Executive carries out that function in conformity with the rule of law.

Auer deference reflects appropriate respect for the superior fact-finding and policy-making capabilities of administrative agencies. It is inevitable that interpretation and judgment will be required in decisions about how agency regulations are to be applied. No amount of care and diligence will ensure that an agency promulgating a regulation has accounted for every possible question that could arise concerning its meaning. That is precisely why they need latitude when they utilize regulatory tools other than notice-and-comment rulemaking, such as interpretive rules and adjudicatory procedures, to address the often-difficult questions of application. As this Court has explained, "applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives." *Martin v. OSHRC*, 499 U.S. 144, 151 (1991). Often the agency will have direct knowledge of what the regulation was intended to mean, or at least the purposes it was designed to serve. See *id.* at 152 ("Because the Secretary promulgates these standards, the Secretary

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Cir. 1944); *Walling v. Cohen*, 140 F.2d 453, 456 (3d Cir. 1944); *NLRB v. J.S. Popper, Inc.*, 113 F.2d 602, 603–04 (3d Cir. 1940); *Green Valley Creamery v. United States*, 108 F.2d 342, 347 (1st Cir. 1939).

is in a better position than is the Commission to reconstruct the purpose of the regulations in question.").

Sometimes, to be sure, an agency faces a question it did not anticipate when it promulgated the regulation, or its interpretation of the regulation has changed. Even then, *Auer* deference remains fully appropriate. Judgments about what an agency regulation "means" in this context will inevitably entail judgments about how specific regulatory requirements, and underlying policy objectives, are best implemented in highly specific factual settings. Making such judgments is at the core of agency competence. And it is a competence that courts generally lack. *Auer* deference is particularly important when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted); see also Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449, 1456–58 (2011).

It is for all these reasons that this Court has recognized that the "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. OSHRC*, 499 U.S. 144, 151 (1991). Critics of *Auer* thus miss the point in arguing that the standard forces a court to shun the "best reading" of the regulation. *Auer* is a longstanding, sensible guidepost to *identifying the best reading*.

Allocating decisional responsibility in this way also furthers essential principles of democratic accountability. In this respect, *Auer* deference rests on the same fundamental premise as *Chevron* deference to agency interpretations of the statutes they are charged with implementing:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

Questions of application reflect legitimate policy choices fully as much as decisions about which regulatory provisions to promulgate. And the Executive is just as accountable to the people for judgments about those policy choices as for the policy choices that determine which regulations should be enacted in the first place. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Id.* (quoting *TVA v.*

Hill, 437 U.S. 153, 195 (1978). Petitioner would, however, displace the decisional authority of these politically accountable actors with that of unelected judges.

The present case amply illustrates the practical and conceptual soundness of *Auer* deference. The reading of "relevant" that the BVA and CAVC adopted was evidently based on a recognition that Petitioner's broad interpretation would undermine the purposes of the carefully delimited provision for "reconsidering" (as opposed to "reopening") the earlier VA decision. The Federal Circuit was quite right to rely on the administrative authorities' sense of how the program should work, after it found that other arguments presented to it, such as the use of the word "relevant" in other legal contexts, were inconclusive.

B. Petitioner's criticisms of *Auer* deference are unfounded.

1. Meaningful Review. *Auer* reflects a proper understanding of the judicial role in reviewing agency action. The contrary claims by Petitioner and his supporting amici are baseless.

Petitioner says that "[w]hen there is more than one reasonable interpretation of a regulation, *Auer* authorizes an agency to pick the interpretation it favors as a policy matter–and gives that choice the force and effect of law." Pet. Br. at 25.[4] This argument misconceives

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[4] Respondent similarly objects to "the seeming incongruity of giving controlling weight to an interpretive rule that is not meant to carry the force of law." Resp. Br. at 26. To the extent Respondent's concern is about the supposed tension between *Auer* and the APA's distinction between legislative and interpretive rules, that

the manner in which the term "controlling" is used in *Auer*. An agency's interpretation of a regulation is afforded "controlling weight" *only* if it is not "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. In fact, *Auer* deference is similar to countless statutes providing "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive" or containing very similar language. E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. Pa. L. Rev. 1026, 1026–29 (1941). These statutory provisions have never been understood as commands to accord agency decisions conclusive effect with inconsequential exceptions. To the contrary, they simply mean that the standard of review is substantial evidence.

Thus, *Auer* is properly understood as a standard of review much like others that govern judicial review of agency action, not as an abdication of judicial responsibility. To begin with, it is up to the reviewing court to evaluate whether an agency's interpretation of a regulation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. The agency's interpretation is given controlling weight only if it passes muster under that standard. As this Court explained in *Perez v. Mortgage Bankers Association*, "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the

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concern—despite the length at which it is discussed in Respondent's brief, Resp. Br. 22–26—is out of place in this case, which developed out of adjudication and does not involve an interpretive rule at all.

agency says." 135 S. Ct. 1199, 1208 n.4 (2015). Courts apply standard interpretive tools to make that determination, just as they do when reviewing agency interpretations of the statutes they administer under *Chevron*. Just as under *Chevron*, reviewing courts can and do conclude that the regulation under review is not ambiguous and deny the agency's interpretation any deference on that basis. And—again, just as under *Chevron*—whether a reviewing court defers to an agency's interpretation of a regulation often depends on the interpretive methodology it employs, rather than the scope of review. See Kevin M. Stack, *The Interpretive Dimensions of Seminole Rock*, 22 Geo. Mason L. Rev. 669, 679–82 (2015).

This Court has long made clear, moreover, that "*Auer* deference is not an inexorable command in all cases." *Perez*, 135 S. Ct. at 1208 n.4. In *Christopher v. SmithKline Beecham Corporation*, this Court held that reviewing courts will not defer to an agency interpretation "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment." 567 U.S. 142, 155–56 (2012) (citation and internal quotation marks omitted). An agency's interpretation may receive no deference if it creates a risk of "unfair surprise," "conflicts with a prior interpretation," or appears to be "nothing more than a convenient litigating position." *Id.* (citation and internal quotation marks omitted). See also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (citations and internal quotation marks omitted)). And courts will not defer to agency inter-

pretations of regulations where "the underlying regulation does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

More broadly, agency interpretations of regulations must satisfy the basic requisites applicable to agency action under the APA. Agency interpretations must be adequately explained. They must be sufficiently well reasoned and supported to survive review under the arbitrary and capricious standard. If the agency's interpretation deviates from prior policy the agency must provide a reasoned basis for the change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

In all of these respects, reviewing courts retain a robust role in ensuring that agency interpretations of ambiguous regulations reflect respect for rule of law values, principles of sound decision-making, and fairness to regulated entities and the public.[5] And, unsur-

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[5] Empirical studies do not support concluding that *Auer* is dramatically different in impact from other common deference doctrines. One study "suggests that district courts and circuit courts apply *Auer*/*Seminole Rock* deference in about the same manner as they and the Supreme Court apply the other deference doctrines that have been subjected to empirical study." Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 520 (2011). A later study, examining cases decided from 2011 to 2014, suggested that the criticism of *Auer* in Supreme Court opinions has led to a downward trend in affirmance rates, ending up at 70.6%. Cynthia Barmore, *Auer in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 827 (2015). A more recent study found that "the federal government prevailed in 74% of cases when the court invoked *Auer* and in 68% of cases when it

prisingly, the doctrine of *Auer* deference has not remained static over time. It has evolved as courts, through the accumulation of experience, come to recognize the ways in which deference should be cabined to ensure that agency action conforms to these fundamental values and principles. There is no reason why courts cannot continue to shape the doctrine incrementally to the extent future cases illuminate the need for further refinement. Such an approach reconciles the competing values and interests at stake far better than Petitioner's proposal to abandon deference altogether and transfer to unelected judges the responsibility to decide upon the "best" way to resolve the policy and practical questions that often underlie disputes about regulatory interpretation. If this Court is of the view that reviewing courts are not currently striking that balance in an appropriate fashion, it can and should direct courts to be more conscientious in their application of governing principles. Overruling *Auer* would be a "cure" much worse than any disease.

A similarly dubious "cure" is Respondent's proposal to "narrow" *Auer* by imposing various strict threshold conditions on its applicability. We see no reason for such a procrustean solution. On the contrary, as this Court's *Auer* jurisprudence demonstrates, the normal case-by-case method is well able to develop tailored responses to potential misuse while preserving the benefits of *Auer* and avoiding overgeneralizations. For example, whereas Respondent would deny *Auer*

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invoked *Chevron*," but the study covered a twenty-year period, from 1993 to 2013, and the data showed that the government's win rate when invoking *Auer* "fell significantly" after 2006, to 71%. William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 Geo. L. J. 515, 519–20 (2018). The study concluded that "*Auer* is no longer super deference." *Id.* at 547.

deference whenever an agency has changed its interpretation, Resp. Br. at 30–33, *Christopher* identified "conflict[] with a prior interpretation" as simply one of several factors that "*might*" signal *Auer* deference was unwarranted. 567 U.S. at 155 (emphasis added). Courts have heeded this message. See *Perez v. Loren Cook Co.*, 803 F.3d 935, 939, 940–43 (8th Cir. 2015) (refusing to defer to changed interpretation on grounds, *inter alia*, of "unfair surprise"); *Independent Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) (same). But there is no reason to transform *Christopher*'s "might" into "must." As a unanimous Court stated in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007), "as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."

Petitioner and several amici urge replacing *Auer* deference with *Skidmore* deference, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see, e.g., Pet. Br. at 43; Merrill Br. at 19–24, even contending that such a change would have limited impact in practice.[6] Cato Br. at 15–19. In assessing such claims, it

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[6] Perhaps seeking to minimize the distinction between *Auer* and *Skidmore*, Amici Cato et al. argue that "the government's brief in *Seminole Rock* explicitly cited the *Skidmore* principle," making the decision "an unremarkable application of . . . *Skidmore*"). Cato Br. at 16–17; see also Resp. Br. at 16 (stating that the brief "argued for deference primarily on the basis of *Skidmore*."). A reading of the full passage in the Government's brief in that case shows that it by no means equated the two standards:

is important to be clear about what such a move would entail, as *Skidmore* is notorious for the broad variety of approaches it encompasses in various judges' hands. See Kristin E. Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1250–71 (2007). A reading of the briefs just mentioned confirms that lack of consensus about *Skidmore*'s meaning. If *Skidmore* is read as instructing courts to accept agency interpretations of regulations once courts are independently "persuaded" that such interpretations are correct, see Hickman & Krueger, *supra*, at 1251–55, then the distance between *Auer* and *Skidmore* is substantial and the benefits of *Auer* would be lost; indeed, this version of *Skidmore* hardly qualifies as deference at all. If, on the other hand, *Skidmore* is read as embodying a presumption that courts will accept reasoned agency interpretations that are consistent with the regulation (and statutes) at issue and supported by the record, subject to

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> Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator's views as to the meaning of the statute under which he is operating. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–140. The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. This Court has gone so far as to say that the latter type of "interpretation is binding upon the courts." [citing the cases listed in note 2 supra]. It is not necessary to go that far here, however, inasmuch as the construction adopted by the court below is wholly without merit.

Brief for Petitioner, *Seminole Rock*, No. 914, at 20–21 (O.T. 1944). "[O]bviously . . . much greater" hardly suggests an equivalency between the two standards.

certain exceptions, then the distance between *Auer* and *Skidmore* may be minimal. But in that case, it is hard to see what would justify the confusion and outcry entailed by "overruling" *Auer* and replacing it with a substantively similar *Skidmore*.

2. No aggrandizement. Petitioner's argument that *Auer* deference facilitates a bureaucratic power-grab, Pet. Br. at 37–38, is also unsupported. Whatever the theoretical allure of the argument that *Auer* induces agencies to write vague regulations, it does not survive an encounter with actual experience. Petitioner and his supporting amici have come up with no real factual support—not even anecdotal evidence, much less solid empirical analysis—to back up this criticism of *Auer*.[7] Cass R. Sunstein & Adrian

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[7] As his only evidence supporting the critique, Petitioner cites a study conducted by Professor Walker. Pet. Br. at 38 n.3 (citing Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015)). Walker sent surveys to agency rule drafters asking whether different deference doctrines played a role in their rule-drafting decisions. 67 Stan. L. Rev. at 1072–73. Among respondents, 39% said they used *Seminole Rock/Auer* in their rule drafting, far fewer than the number who said they used *Chevron* (90%) or *Skidmore* (62%). *Id.* at 1061. Due to space limits, rule drafters were not asked how they "use" *Auer* deference when drafting regulations, *id.* at 1065–66; "use" might mean nothing more than that rule drafters remain mindful of relevant judicial review standards, as a competent rule drafter might be expected to do. In other words, the responses shed no real light on their motivations (to say nothing of the 61% who did not say they use *Auer* at all). Walker himself concludes that the impact of *Seminole Rock/Auer* on those who answered affirmatively is "a bit of a puzzle." *Id.* at 1065. Notably, the only respondent whom Walker quotes as offering an additional comment expressly denied being influenced by the purported incentive to write vague regulations. *Id.* ("Re *Seminole Rock/Auer*, I personally would

Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 308 (2017) ("[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely and broadly. There is no reason to believe that the magnitude of the posited incentive is substantial."); Ronald M. Levin, *Auer and the Incentives Issue*, 36 Yale J. On Reg.: Notice & Comment (Sept. 19, 2016), http://yalejreg.com/nc/ *Auer*-and-the-incentives-issue-by-ronald-m-levin/ ("It is disconcerting that the challenge to *Auer* deference has picked up so much steam with so little factual grounding for one of its key premises."). Indeed, in the very cases in which Members of this Court have questioned *Auer* on this basis, the regulations at issue did not exemplify the kind of discretion-enhancing vagueness and breadth that *Auer* deference allegedly produces. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211–1213 (2015) (Scalia, J., concurring); *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 616–21 (2013) (Scalia, J., concurring in part and dissenting in part); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring).

Even more to the point, the most ambitious effort to date to test the hypothesis did not find that *Auer* deference had produced the kinds of "vague and open-ended" regulations that critics posit. See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 85, 105 n.88 (2019). Walters undertook an empirical analysis of economically significant rules promulgated during the period 1982–2016 to test what he

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attempt to avoid issuing ambiguous regulations that we would then have to interpret.")

called the "self-delegation" thesis—namely, that *Auer* deference incentivizes agencies to promulgate broad and vague regulations. *Id.* at 90, 119. Applying multiple well-recognized linguistic measures of clarity and definiteness to a dataset including over 1200 rules, Walters concluded that "[t]he most notable statistically significant finding from all of the analyses is the complete opposite of what the self-delegation thesis would have predicted—clarity over legal duty actually increased following *Auer*." *Id.* at 138–39. More variation existed for major rulemaking agencies (those with more than twenty rules in the dataset), with some such agencies increasing "the clarity of their rule texts over time" while others "show[ed] more volatile patterns, with major upticks and downticks in vagueness both before and after *Auer*." *Id.* at 132. Yet even here Walters did not find the consistent trend towards vagueness that the self-delegation thesis would predict. Noting that his findings "remain robust even after looking at the data from a number of angles," he concluded that "[t]hese results, if nothing else, shift the burden in the debate over *Auer*." *Id.* at 142.

It is not difficult to understand why *Auer* fails to produce the results that its critics fear. Even if *Auer*, considered in isolation, might in theory create an incentive for agencies to promulgate broad and vague regulations, the incentives to produce regulations that are clear and specific are stronger and more numerous. Persons and entities subject to regulatory regimes seek clarity so that they can conform their conduct to law, and routinely press agencies to produce such clarity in their formal comments and ex parte communications during rulemaking proceedings. By the same token, regulators want their regulations to be effective,

and clarity promotes compliance and effective enforcement. See Sunstein & Vermeule, *supra*, at 309.

The existence of "hard look" review of agency rulemaking under the APA's "arbitrary and capricious" standard also provides a powerful spur toward clarity and specificity. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). It is well established that agencies conduct rulemakings with eventual judicial review firmly in mind. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1419–20 (1992); Walters, *supra*, at 157–64.[8]

Indeed, a study by the Administrative Conference of the United States specifically found that agency officials favor clarity and specificity in agency rules as means of reducing adverse judicial rulings under the hard look doctrine. See Blake Emerson & Cheryl Blake, Admin Conference of the U.S., *Plain Language in Regulatory Drafting: Final Report*, 14–19 (Dec. 8, 2017), https://www.acus.gov/sites/default/files/documents/Plain%20Regulatory%20Drafting_Final%20Report.pdf. The study quotes agency officials explaining that agencies can "defend regulations better when we've developed the record and made the regulation clear and understandable to the public," and that if "regulations just aren't understandable, or they can be misconstrued you are a lot more vulnerable legally." *Id.* at 14–15. See also Walters, *supra*, at 163.

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[8] See also Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 Law & Contemporary Problems 1, 26 (1998). (To reduce the risk of defeat in court, agency lawyers typically seek "to achieve clarity in the wording of the rule" at issue).

If all of that were not enough, "for agencies, ambiguities are a threat at least as much as they are an opportunity." Sunstein & Vermeule, *supra* at 309. In promulgating regulations, agency officials know that they will not always be in a position to control how those provisions will be interpreted and enforced over time. Future administrations may approach enforcement of a particular regulatory regime from very different policy or value perspectives. A precise and clear regulation limits the interpretive and enforcement discretion of future administrations—requiring the often laborious process of renewed notice and comment rulemaking to implement a change of direction. In contrast, a broad and vague regulation confers on future administrations the power to interpret and enforce that regulation in a manner that its promulgators would find ineffective or even harmful. *Id.*

Finally, the present case is a particular inapt one in which to advance the argument that agencies exploit *Auer* deference to aggrandize their power. It is implausible to imagine that the Veterans Administration used the word "relevant" in § 3.156(c) in order to leave latitude for a less circumscribed decision later. Nobody has suggested as much. More likely, it never occurred to anyone that the regulation would be read as Petitioner reads it. Moreover, the VA would have known that, if interpretation of its regulation were to prove necessary, that job would be done in review by the CAVC, which Congress created for the very purpose of affording an independent review within the administrative process. The CAVC, an Article I court, is "a court of record" that is independent of the Department of Veterans Affairs and its decisions are not subject to the Secretary's review. See 38 U.S.C. §§ 7251–52; see also 38 U.S.C. § 7281(h) ("The Court shall not

be considered to be an agency within the meaning of section 3132(a)(1) of title 5."). Moreover, the CAVC reached its interpretation in this case in the absence of an instruction on point from the Secretary or an opinion by the Department's chief legal officer[9] and did not suggest that its affirmance of the BVA's reading of "relevant" rested on deference.

3. No inconsistency with the APA's rulemaking provisions and the values they further. At its core, Petitioner's argument appears to be that notice and comment rulemaking is the only legitimate means of significant agency policy-making, and that agencies should therefore be denied the discretion to make any material policy choices outside of that process. But that is simply incorrect. It has been clear since even before enactment of the APA that, unless governing statutes or regulations provide otherwise, agencies may announce new principles in adjudicatory proceedings rather than through generalized rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). *Chenery* explained why this doctrine is essential:

> In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

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[9] See 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.")

> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.

332 U.S. at 202–03.

Courts have been vigilant in guarding against unfair retroactivity or defeat of justified reliance interests, and this may preclude application of newly announced principles to the case at hand.[10] Within the context of those safeguards, however, policymaking by adjudication is commonplace. Indeed, Petitioner's argument is anachronistic. In the early years of the APA, adjudication was the norm and substantive rulemaking was exceptional. See Reuel E. Schiller, *Rule-*

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[10] See, e.g., *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–55 (2012) (holding that the FCC's failure to provide notice of its statutory interpretation "fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited" and prevented holding regulated parties liable for violating statutory provision) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102–03 (D.C. Cir. 2001) (upholding articulation of new policy but not its application where "retroactive application" of the new policy would work a "manifest injustice").

making's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 Admin. L. Rev. 1139, 1145–47 (2001).

For similar reasons, there is no merit to Petitioner's argument that *Auer* deference "injects intolerable unpredictability into agency action." Pet. Br. at 36. This argument essentially repeats, in a different guise, Petitioner's unwarranted assumption that the legal system misfires whenever policies are made by a means other than legislative rulemaking. As just explained, policymaking through adjudication is often a necessary alternative to rulemaking; and well-established case law safeguards protect justified reliance interests when an unforeseen interpretation might lead to unfairness. Indeed, a wholesale shift from agency to court of the responsibility to decide upon the "best" interpretation of ambiguous regulations is not likely to confine agency discretion in the manner Petitioner posits. Rather, such a shift might have the perverse effect of giving agencies less incentive to write rules in the first place and to instead make policy through case-by-case adjudications—as they are entitled to do, and as was the norm in the first decades of administrative practice. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 Geo. L.J. 943, 948 (2017).

Such a shift could also be expected to produce instability and disuniformity in the wake of judicial review of agency interpretations. Given the difficulty of applying often technical regulatory language in diverse and complicated factual settings that may or may not have been anticipated by the drafters of the regulation, it stands to reason that courts will come to different and conflicting judgments about how a regulation is "best" or "most fairly" read. See Peter L. Strauss, *One*

Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1121–22 (1987). Such conflicting rulings would raise the cost of compliance for regulated entities and could undermine settled expectations in regulated industries. By reducing both the incentive to prefer adjudication over rulemaking and the prevalence of conflicting judicial interpretations of regulations, *Auer* promotes clarity, fair notice and stability over time.

4. No inadequacy of procedure. Relatedly, there is no merit to Petitioner's contention that the principles of *Mead* foreclose *Auer* deference because agency interpretations of their own regulations lack procedural safeguards. This Court has not limited *Auer* to formal proceedings. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) ("*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief") (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207–08 (2011)). And *Mead* itself made clear that interpretive deference is sometimes appropriate "even when no such administrative formality was required and none was afforded." *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001). Moreover, the APA contains exemptions from notice-and-comment requirements for certain classes of rules that would likely elicit *Chevron* deference. *See* 5 U.S.C. §§ 553(a)(1)–(2); 553(b)(B); *City of New York v. Permanent Mission of India to UN*, 618 F.3d 172 (2d Cir. 2010) (State Department rule qualified for foreign affairs exemption and also for *Chevron* deference); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225 (D.C.

Cir. 1994) (Medicare rule qualified for good cause exemption and *Chevron* deference).

Even if the principles of *Mead* might have some relevance to the question of deference to interpretations of regulations generally, they pose no difficulty here. The decisions by BVA and CAVC were rendered through use of the very procedures that Congress designed for resolving cases of this sort. Thus, in *Mead* terms, Congress "would expect" their decisions to receive substantial deference. Cf. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246–49 (9th Cir. 2013) (allowing *Chevron* deference for HHS approvals of state Medicaid plans because these decisions, although informal, were exercises of expressly conferred legislative authority); *Pharmaceutical Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 819 (D.C. Cir. 2004) (same).

The veterans' adjudication process involves significant adjudicative procedures, including the filing of briefs and written opinions. According to one observer, after the Veterans Judicial Review Act was adopted, the CAVC "quickly developed one of the most demanding rubrics of appellate review known in the American legal system. . . . [The CAVC] will ordinarily not reach the merits of an issue . . . unless the BVA explicitly has made all the relevant findings of fact and explained why any unfavorable findings were resolved against the veteran." James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 273–74 (2010). "Therefore, '[i]n practice, [the Act's reasons requirement] means that . . . the [BVA] decision must affirmatively

discuss all the relevant evidence and law, and articulate a valid and comprehensive basis for denying benefits.' This stern standard . . . has added a substantial layer of formality to a once highly informal system." *Id.* at 274. In short, the agency's interpretation here fits well within the kind "fair and considered judgment" that the *Christopher* Court required for *Auer* deference to be warranted. See 567 U.S. at 155.

If the Court wishes to consider holding that *Auer* deference should be withheld in other contexts in which a more informal decision is reached, it should await a case that presents such a situation.

II. *Auer* Deference Raises No Issue Under the Constitution or the Administrative Procedure Act.

A. *Auer* deference is fully consistent with the Constitution's separation of powers.

Judicial deference to agency interpretations of ambiguous regulatory provisions they administer is fully consistent with the Constitution's separation of powers. Such deference is in no sense an intrusion on the authority of Article III courts to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Nor does it unconstitutionally aggrandize executive power by impermissibly combining law-making and law-applying responsibilities.

Auer deference neither "transfer[s] . . . judicial power to the Executive Branch," nor "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches," as some critics allege. *Perez*

v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment). Far from it. *Auer* deference does not "amount[] to a transfer of the judge's exercise of interpretive judgment to the agency," *id.* at 1219–20, because, as discussed above, it applies only to reasoned interpretations that are not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. This standard leaves room for the courts to impose significant control over agencies' interpretations of regulations, and they have done so, incrementally identifying contexts in which *Auer* deference is inappropriate. Moreover, to hold that courts cede the judicial power when they defer to reasonable agency interpretations that are consistent with governing statutes and regulations would invalidate all forms of deference to agency interpretations—not simply *Auer*, but also *Chevron* and even *Skidmore* deference.

Similarly, *Auer* deference is perfectly compatible with separation of powers principles as traditionally understood. The field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a balance of power among the branches of government. "[T]he separation of powers is fully satisfied so long as the principal institutions set out in the Constitution—Congress, president, and judiciary—exercising their prescribed functions, devise and approve the scheme of agency authority that combines rulemaking and rule-interpreting power in the agency's hands." Sunstein & Vermeule, *supra* at 311; see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 580 (1984) ("What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions

to which parts of the authority of each may be lent."). When an agency action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms apply in the same way as they usually do in the case of other administrative actions. Any agency interpretation that would be a candidate for *Auer* deference must relate to a matter that is within the substantive authority that Congress delegated to the agency.[11] And it is for the courts ultimately to decide whether an agency acts in a manner that is consistent with that authority. Just as *Chevron* provides the appropriate framework for answering that question when an agency has enacted a regulation implementing an ambiguous statutory provision, *Auer* provides the appropriate framework for answering that question when interpreting a regulation.

For these same basic reasons, *Auer* deference does not violate any separation-of-powers principle that "the power to write a law and the power to interpret it cannot rest in the same hands." See *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part). The Constitution has never been understood to

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[11] Some amici insist that an agency should have no claim to *Auer* deference unless Congress specifically empowered it to adopt authoritative interpretations of its regulations. *See, e.g.*, Merrill Br. at 14–16. Yet in many cases, probably including this one, the agency would have had clear statutory authority to reach the same substantive result, such as through an adjudication, even if it had never issued the regulation in question in the first place. It is difficult to see why, under such circumstances, the additional showing sought by amici should be needed in order to validate the administrative action's congressional bona fides.

require such a stark and complete division of functions. To the contrary, this Court has repeatedly stated that the combination of functions in an agency is not itself unconstitutional. See *Withrow v. Larkin*, 421 U.S. 35, 54–55 (1975); *Marcello v. Bonds*, 349 U.S. 302, 311 (1955); *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). For example, agencies routinely enforce regulations that they have promulgated and routinely adjudicate violations of those regulations in administrative proceedings. If the separation of powers forbids agencies from both promulgating rules and deciding what they mean, then these well-established and core functions of public administration are illegitimate—they would violate the supposed prohibition on combining law-making and law-interpreting functions far more starkly than does *Auer* deference. That cannot be correct.

At bottom, what the Petitioner and his supporting *amici* seek is not the application of any familiar, accepted separation-of-powers principle but the creation of an entirely new and unrooted limit on the scope of agency authority. But, as demonstrated above, the supposed problem that motivates calls for this new limitation—the risk that agencies will "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later," *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring)—is not a problem that exists in the real world. It therefore cannot justify overruling *Auer*.

B. *Auer* deference is fully consistent with Section 706 of the APA.

Auer deference does not violate Section 706 of the APA. Section 706 provides that "the reviewing court

shall decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706, but its language does not specify the manner in which courts are to "decide" or "determine" these matters. Courts are free to rely on common canons of construction, of which *Auer* is one, in doing so.

The lack of constraint that the APA imposes in this regard is borne out by the Attorney General's Manual on the APA. The Manual says of section 10(e) (now § 706): "This restates the present law as to the scope of judicial review." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 107–08 (1947).[12] In reaching this conclusion, the Manual relies on a passage in the Comparative Committee Print published by the Senate Judiciary Committee in 1945, which had elaborated:

> A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. . . . It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review.

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[12] The Manual has been "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

See *Administrative Procedure Act: Legislative History*, S. Doc. No. 79-248, at 39 (1946) (reprinting the Committee Print).

The term "restatement" implies a congressional acknowledgement that the courts are the engines of doctrinal change in this area. The role of section 10(e) of the APA, therefore, was merely to summarize judicial doctrine without circumscribing future developments. Indeed, in the years following the enactment of the APA, the Court did not understand the provision as constraining its elaboration of deference principles. "From 1946 to 1960, the Court never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law. On the contrary, several decisions explicitly embraced that idea." Cass R. Sunstein, *Chevron as Law*, Geo L.J. (forthcoming), at 36, https://ssrn.com/abstract=3225880. And it bears remembering that *Seminole Rock*, the direct precursor of *Auer*, was decided in 1944, while the APA was being drafted. If the drafters had intended to overrule so recent a decision of the Supreme Court, they surely would have made that intention known, yet there is no indication that they did.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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